No. 40. VOL. VI.

The Balance, AND COLUMBIAN REPOSITORY.

"HAIL SACRED POLITY, BY FREEDOM REAR'D!
"HAIL SACRED FREEDOM, WHEN BY LAW RESTRAIN'D!"
BEATTIE.

HUDSON, (New-York) TUESDAY, OCTOBER 6, 1807.

Original.

Hither the products of your closet-labors bring,
Enrich our columns, and instruct mankind.

FOR THE BALANCE.

THOUGHTS.

THE Letters of *Junius* have been much and justly celebrated, though, perhaps, more highly than they deserve. They are not equal in wit and ingenuity to the "Drapier's Letters" by *Dean Swift*.

All the human laws which can be made, will be ineffectual to restrain crimes, unless a sense of moral obligation is supported.

It is a false notion that chewing tobacco saves the teeth. The best preservatives are clear water and a good brush.

Were nothing else recorded of Henry the Fourth of France, it ought to immortalize him, that he wished to live to see a fowl in the pot of every peasant of his kingdom.

Some persons too soon think themselves learned and wise; and some impressed with a notion of their being too old, relinquish the pursuit of acquirements which they might have attained.

A coward may revenge an offence, and obtain applause; but he is a hero who can forget it, and suffer reproach.

A man who had never heard of the novel of "Rasselas, Prince of Abyssinia," attempted to fly. After making his preparation, he ascended the top of a gate, and fell to the ground. It is not known whether he adopted or thought of the "continuity of the bat's wings." Such is generally, the fate of all projectors.

To constitute the useful friend, zeal and prudence must be united. Without the former, he will do little; and without the latter, he will produce mischief.

A speaker having extolled Voltaire, on a public occasion, a gentleman expressed his dissatisfaction to his friend, who replied, "He should have let Voltaire go to the devil in his own way."

The practice of burying in churches is improper, and savours of superstition.

To judge of the character of a person, it is not enough to examine the features of his face; we must take a view of his whole appearance, his dress, and his gait. A piece written by one against his schoolfellow, contained the following lines:

"But mark his walk! his capering heels
"Betray the pride the creature feels."

He who takes pleasure in hearing calumnies, is as guilty as he who publishes them.

That can hardly be called virtue which has not encountered and overcome difficulties and temptations.

A man's real character must not be estimated from what is said of him, either by his friends or his enemies, without considerable allowance.

Speakers are often so profuse and prolix, that the hearers, before the conclusion, forget what was said in the beginning; while (strange as it seems) the orator is insensible that he is exhausting the patience of every body, and that his last word is reckoned the most acceptable.

MENTOR.

FOR THE BALANCE.

EXTRACT FROM A LETTER.

"YOU will find that suspicions of Gen. Wilkinson having acted an unfair part, are increasing. As he has not given his evidence in court, and his letters to Mr. Jefferson have been withheld, I am not prepared to decide. It has cost the United States a considerable sum to bring him to Richmond, and I suppose they must take him back; when lo! he cuts a less respectable figure than when he was on the Sabine river, facing the Spaniards, or fortifying New-Orleans against the prodigious army of Col. Burr.

"The story of his attempt on the life of Mr. Duncan, by poison, ought not to be credited, unless circumstances are made fully and plainly to appear. I have heard it said that he had absconded, but cannot believe it. He may have thought it necessary, in this hour of danger, to repair to his post; or Mr. Jefferson may have ordered him thither, to display his usual military tactics. I have understood that he is so corpulent as to be a pretty good security against his running away.

"Some persons account for the part which he has acted, from his being a Spanish pensioner—from a fear that if Col. Burr came in sight of Louisiana, he would be a greater man than himself—and that a furious display of zeal in defeating some imaginary and nefarious plot was necessary to hinder himself from being displaced, and the "hero of Derne" put in his place. I really know nothing of these things. To me they rest on mere report; which ought not to condemn any man; though some wished to hang Col. Burr without waiting for a trial.

"There are tongues busy also with the "hero of Derne." They pronounce, from the tenor of his testimony, that he cannot possibly be a great man. But may not a man be great in deeds and not in words? I confess that he has dropped some things, which I had rather not seen, and which may have been kindled by his martial flame, or escaped him through the want of his notes. I am still inclined to believe that he is a hero; and that had Mr. Jefferson given him the command of the army, and sent Col. Burr on a foreign embassy, as the hero strongly recommended, no testimony had been given, and no boats built, and provisions purchased at Blennerhasset's island."

FOR THE BALANCE.

THERE is an editorial paragraph in the *Albany Register* of September 29, calculated to excite the gaze of the world. It was not known until lately that the editor was so profound and sagacious a lawyer, who has gobbled Coke, Blackstone, and all the reporters yet extant. "The perversion of law," says he, "having rescued BURR and his tools from the hand of justice" &c. How is it to be lamented that this paragon of legal knowledge did not preside at the trial, or that he did not communicate to Judge Marshall his opinion collected from the most deep investigation! It may be that even yet, in consequence of his advice, a tree can be found, by traversing the country from Blannerhasset's island to New-Orleans, big and strong enough on which to hang Burr. It is certain that he ought to be hanged somewhere, the judge and jury notwithstanding; for so says this prodigious man, whose mind is as luminous as the sun, and as capacious as the ocean.

The editor or whoever writes for him, pronounces further, that this "country owes its salvation to *Jefferson, Wilkinson* and *Eaton*." Glorious triumvirate! The middle being reckoned the most honorable, it might have been expected that Mr. Jefferson would have been placed there; with the hero of Sabine in the front, and the hero of Derne in the rear, but this writer is an original and correct thinker, and could not assign to so brave a man, a place among the baggage.

He makes also a deadly thrust at certain presses, as follows: "the press can be prostituted to their diabolical purposes;" that is to screen traitors, and calumniate Jefferson, Wilkinson and Eaton, and other shining characters. O immaculate *American Citizen!* O patriotic *Aurora!* O enlightened *Albany Register!* How much are mankind indebted to you for the consummate talents and sterling integrity with which you are conducted! You are the interpreters of the law! You wield the sword of justice! You would hang Burr, his judge, jury and counsel, with all whom you tho't to be traitors, whether there was proof or not! The world must bow to such sublime statesmen, to such great conservators of peace, order and good government; particularly to that northern luminary who promises by his knowledge of law to irradiate the nations. CAUSIDICUS.

Editorial.

NEW ARRANGEMENTS.

THE editor and proprietor of the Balance, has found, upon an accurate calculation, that the present mode of publishing his paper, does not yield him a suitable compensation for the great trouble and expense of prosecuting the work; and as he can discover no good reason why he should furnish his readers with better paper and twice as much matter as other printers, at the same or a less price, he has resolved on the following arrangements.

After the first of January next, the Balance will be printed in a royal quarto form, on paper at least equal, if not superior to that now used. The two outside leaves, or so much of them as is found necessary, will be devoted to advertisements; and the remainder of the paper to literary, political, and miscellaneous matter *(principally if not wholly original)* in as great variety as at present; and as the advertising pages will not be titled or numbered to correspond with the Balance pages, they may be separated before binding, and the latter only preserved.....The price, by mail, will be *two dollars* per annum, the subscribers paying the postage. Considering the terms of other papers, of similar stamp and workmanship, this price will be found comparatively low; and we feel a confidence that every subscriber will be satisfied with the arrangement.

POSTSCRIPT.

The above plan is proposed on the supposition that the editor will be enabled by the punctuality of his patrons, to continue his work after the present volume; and he hopes that he may not be disappointed: But he declares, with truth and sincerity, that unless a considerable portion of his demands are settled within the present and ensuing month, he will deem it his duty to relinquish a laborious and profitless task, for one attended with less risk and perplexity, and promising some advantage.

Editor's Closet.

Extract from a letter.

"I think Mr. Marshall a very able and impartial judge; an ornament and a blessing to this country; but I should not wonder if the democrats attempt to have him impeached for not instantly ordering Col. Burr to be hanged. They see no need of evidence, and they are a law unto themselves. The improper, indecent, and bloody paragraphs which have appeared in some of the papers, show the dreadful nature of jacobinism. It will involve this country in bloodshed, and end in an iron despotism, unless nobly and firmly resisted."

The following base and villainous paragraph appears in a late National Ægis:—

Burr Acquitted—and Treason Encouraged!

The mail of yesterday brought us the highly important intelligence of Burr's acquittal on the charge of high treason; not for want of evidence of guilt: that has been completely proved—but because *John Marshall*, chief-justice, the same *John Marshall* who has been *strongly suspected of being a partner in Burr's treason*, has decided that the jury could not receive any evidence against him because he was not present at the overt act, though just as guilty, and although the supreme court has before solemnly decided that point in a different manner. We shall make further comments next week. The public will perceive that they must take justice themselves, or go without it while it is administered by such hands as at present.

The following is an extract from an elegant sketch of the character of the late GENERAL HAMILTON, in the *Oracle of Dauphin.*

No man has written a more handsome eulogium on General Hamilton, than Doctor Mason. The description he gives of his character, with which he was intimately acquainted, is highly eloquent and beautiful. It is such a picture as one great man, of liberal mind, ought to draw of another. Speaking of the pricipal misfortune, (in a moral view) of Hamilton's life, and of the slanderous charge of peculation, he says, "The virtuous saw with regret that he stooped to repel it; and with anguish, that in regard to a private abberration, his defence contained a disclosure, of which they admired the ingenuousness, but deplored the occasion, while they wept over a spot in a blaze of excellency." Happy the man that has such an eulogist!

Selected.

From the Evening Post.

The Treaty. We this evening conclude the republication of the very interesting pamphlet on the subject of the late British treaty, and intreat our readers to mark well, what that instrument contained. Let them mark well, that it contained the most important commercial sacrifices, and that these sacrifices were thought of no moment by the president; it is admitted by his own partizans, that he rejected the treaty on grounds totally different. The editor of the Citizen in his paper of this morning, very cautiously abstains from giving any opinion on "the commercial stipulations," he declares that on this point he neither concedes, nor withholds any thing. Thus is he prepared for either course, on the treaty's coming back, should it contain the same sacrifices, and be nevertheless ratified, he is at liberty to defend it; should it be modified in this respect, and put on a better footing, he can then have it to say, that this was owing to the wisdom of "our patriotic and enlightened president." This is one of the "arts of an able editor."

From a Southern Paper.

MESSRS. EDITORS,

I was this afternoon at Saunders' barber shop, in which are a great many caricatures, and among them, that well known one, of "Bonaparte attempting to bestride the Globe." A child of a little more than three years old, who was there, delighted with viewing the pictures, and struck with that remarkable one, cried out to his father, "Papa, papa, see how far that little captain (pointing to Bonaparte) reaches his foot." Had the older politicians of the continent of Europe made the same remark in due

season, it might have saved the subversion of some of their kingdoms; and those among us, who, in their anxiety to express their detestation of British tyranny, which every true American abhors, consider that they serve their country by celebrating French successes, may perhaps find a child's remark worthy of some consideration.

The Conspiracy.

TRIAL OF BURR.

Monday, September 14.

The Chief Justice delivered the following opinion on the question concerning the admissibility of evidence on the indictment, for a Misdemeanor, against Col. Burr:

The United States,
vs.
Aaron Burr, } On a Misdemeanor.

The present motion is particularly directed against the admission of the testimony of Neale, who is offered for the purpose of proving certain conversations between himself and Herman Blannerhasset. It is objected that the declarations of Herman Blannerhasset are at this time inadmissible on this indictment.

The rule of evidence which rejects mere hearsay testimony, which excludes from trials of a criminal or civil nature the declaration of any other individual than of him against whom the proceedings are instituted has been generally deemed all essential to the correct administration of justice. I know not why a declaration in court should be unavailing unless made upon oath, if a declaration out of court was to criminate others than him who made it; nor why a man should have a constitutional claim to be confronted with the witness against him, if mere verbal declarations made in his absence may be evidence against him. I know of no principle in the preservation of which all are more concerned, I know none by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important.

This rule as a general rule is permitted to stand, but some exceptions to it have been introduced concerning the extent of which a difference of opinion prevails, and that difference produces the present question.

The 1st exception is that in cases of conspiracy the acts, and it is said by some the declarations, of all the conspirators may be given in evidence on the trial of any one of them, for the purpose of proving the conspiracy, and this case, it is alledged, comes within the exception

With regard to this exception a distinction is taken in the books between the admissibility and operation of testimony which is clear in point of law, but not at all times easy to practice in fact. It is that although this testimony be admitted, it is not to operate against the accused unless brought home to him by testimony drawn from his own declarations or his own conduct.

But the question to be considered is, does the exception comprehend this case; Is this a case of conspiracy according to the well established law meaning of the term?

Cases of conspiracy may be of two descriptions.

1st. Where the conspiracy is the crime, in which case the crime is complete altho' the act should never be formed, and in such cases if several be indicted, and all except one be acquitted, that one cannot, say the books, be convicted, because he cannot conspire alone.

2d. Where the crime consists in the intention, and is proved by a conspiracy, so that the conviction of the accused may take place upon evidence that he has conspired to do any act which manifests the wicked intention.

In both these cases an act is not essential to the completion of the crime, and a conspiracy is charged in the indictment as the ground of accusation. If the conspiracy be the sole charge, as it may be, the question to be decided is not whether the accused has committed any particular fact, but whether he has conspired to commit it. Evidence of conspiracy in such a case goes directly to support the issue. It has therefore been determined that the nature of the conspiracy may be proved by the transactions of any of the conspirators in furtherance of the common design; the degree of guilt however of the particular conspirator upon trial, must still depend on his own particular conduct.

In the case at bar the crime consists not in intention but in acts. The act of congress does not extend to the secret design if not carried into open deed, nor to any conspiracy however extensive if it do not amount to a beginning or setting on foot a military expedition. The indictment contains no allusion to a conspiracy, and of consequence the issue to be tried by the jury is not whether any conspiracy has taken place; but whether the particular facts charged in the indictment have been committed.

I do not mean to admit that by any course which might have been given to the prosecution, this could have been converted into a case of conspiracy; but most assuredly if it was intended to prove a conspiracy, and to let in that kind of testimony which is admissible only in such a case, the indictment ought to have charged it.

I have not been able to find in the books a single decision, a solitary dictum which would countenance the attempt that is now made to introduce as testimony the declarations of third persons made in the absence of the person on trial, under the idea of a conspiracy where no conspiracy is alledged in the indictment. The researches of the counsel for the prosecution have not been more successful, but they suppose this case, though not within the letter, to come clearly within the reasoning of those cases where this testimony has been allowed.

It has been said that wherever the crime may be committed by a single individual, although in point of fact more than one should be concerned in it, as in all cases of felony, the prosecution must be conducted in the usual mode, and the declarations of third persons cannot be introduced at a trial; but whenever the crime requires more than one person, where from its nature it cannot be committed by a single individual, altho' it shall consist, not in conspiracy, but in open deed, yet it is in the nature of a conspiracy and evidence of the declarations and acts of third persons connected with the accused, may be received whether the indictment covers such testimony or not.

I must confess that I do not feel the force of this distinction. I cannot conceive why, when numbers do in truth conspire to commit an act, as murder or robbery, the rule should be that the declaration of one of them is no evidence against another, and yet if the act should require more than one for its commission, that the declarations of one person engaged in the plot would immediately become evidence against another. I cannot perceive the reason of this distinction; but, admitting its solidity, I know not on what ground to dispense with charging in the indictment the combination intended to be proved. If this combination may be proved by the acts or declarations of third persons made in the absence of the accused, because he is connected with those persons; if in consequence of this connection the ordinary rules of evidence are to be prostrated, it would seem to me that the indictment ought to give some notice of this connection.

When the terms used in the indictment necessarily imply a combination, it will be admitted that a combination is charged and may be proved. And where A. B. and C. are indicted for murdering D. Yet in such a case the declarations of one of the parties made in the absence of the others have never been admitted as evidence against the others. If then this indictment should even imply the fact charged was committed by more than one person, I cannot conceive that the declarations of a *particeps criminis* would become admissible on the trial of a person not present when they were made, unless those declarations form a part of the the very tranaction charged in the indictment.

If in all this I should be mistaken yet it remains to be proved that the offence charged may not be committed by a single individual. This may in some measure depend on the exposition of the terms of the act; and it is to be observed that this exposition must be fixed. It cannot vary with the varying aspect of the prosecution at its different stages. If, as has been said, a military expedition is began or set on foot when a single soldier is enlisted for the purpose, unless it be begun as well by the soldier who enlists as by the officer who enlists him, a military expedition may be begun by a single individual. So if those who engage in the enterprize follow their leader from their confidence in him without any knowlddge of the real object, there is no conspiracy, and the criminal act is the act of an individual. So too if *the* means are *any* means, the crime may be unquestionably committed by an individual. Should the term be even so construed as to imply *that* all the means must be provided before the offence can be committed, still all the means may, in many cases, be provided by a single individual. The rule then laid down by the counsel for the prosecution, if correct in itself, would not comprehend this case.

2dly. There are also cases in the books where acts are in their nature joint and where the law attaches the guilt of all concerned in their commission, so that the act of one is in truth the act of others, where the conduct of one person in the commission of the fact constitutes the crime of another person: but this is distinct from conspiracy.

If many persons combine to commit a murder, and all assist in it, and are actually or constructively present, the act of one is the act of all and is sufficient for the conviction of all. So in acts of levying war, as in the cases of Damane and Purchase, the acts of the mob were the acts of all in the mob whose conduct showed a concurrence in those acts, and in the general design which the mob were carrying into execution. But these decisions turn on a distinct principle from conspiracy. The crime is a joint crime, and all those who are present aiding in the commission of it participate in each others actions, and in the guilt attached to those actions. The conduct of each contributes to shew the nature of the joint crime; and declarations made during the transaction are explanatory of that transaction; but I cannot conceive that in either case declarations unconnected with the transaction would have been evidence against any other than the person who made them, or persons in whose presence they were made. If for example one of several men who had united in committing a murder should have said that he with others contemplated the fact which was afterwards committed, I know of no case which would warrant the admission of this testimony upon the trial of a person who was not present when the words were spoken. So if Damane had previously declared that he had entered into a confederacy for the purpose of pulling down all meeting houses, I cannot believe that this testimony would have been admissible against a person having no knowledge of the declaration and giving no assent to it.

In felony guilt of the principal attaches to the accessary, and therefore the guilt of the principal is proved on the trial of the accessary. In treason all are principals, and the guilt of him who has actually committed the treason does, in England, attach to him who has advised and aided or assisted that treason. Consequently the conduct of the person who has perpetrated the fact must be examined on the trial of him who has advised or procured it. But in misdemeanors by statute, where the commission of a particular fact constitutes the only crime punished by the law, I believe there is no case where the declaration of a *particeps criminis* can affect any but himself.

3dly. The admission of the declarations of Mr. Blannerhasset may be instituted upon under the idea he was the agent of Col. Burr. How far the acts of one man may affect another criminally, is a subject for distinct consideration, but I believe there is no case, where the words of an agent can be evidence against his principal on a criminal prosecution. Could such testimony be admissable, the agency must be first clearly established, not by the words of the agent but by the acts of the principal, and the word must be within the power previously shown have been given.

The opinions of the circuit court of New-York in the trials of Smith and Ogden have been frequently mentioned. Although I have not the honor to know the Judge who gave those decisions, I consider them as the determination of a court of the U. States, and I shall not be lightly induced to disregard them, or unnecessarily to treat them with disrespect. I do not however percieve in the opinions of Judge Talmage any expression indicating that the declarations of third persons could be received as testimony against any individual who was prosecuted under this act. If he has given that opinion, it has certainly escaped my notice, and has not been suggested to me by counsel. He unquestionably says in page 113 of the trial "that the reference which was made to the doctrine of conspiracy did not apply in the case." The reference alluded to was the observation of Mr. Emmet who had said "that if the object was to charge col. Smith with the acts of capt. Lewis they ought to have laid the indictment for a conspiracy." The opinion of the Judge that the doctrine of conspiracy had no application to the case, appears to me to be perfectly correct.

I feel therefore no difficulty in deciding that the testimony of Mr. Neale, unless he can go further than merely stating the declarations made to him by Blannerhasset, is at present inadmissible.

But the argument has taken a much wider range. The points made comprehend the exclusion of other testimony suggested by the attorney for the United States and the opinion of the court upon the operation of testimony. As these subjects are entirely distinct, and as the object of the motion is the exclusion of testimony supposed to be illegal, I shall confine my observations to that part of the argument which respects the admissibility of evidence of the description of that proposed by the attorney for the United States.

The indictment charges the accused in separate counts with beginning, with setting on foot, with preparing, and with providing the means for a military expedition to be carried on against a nation at peace with the United States. Any legal testimony which applies to any one of these counts is relevant. That which applies to none of them must be irrelevant.

The expedition, the character and object of that expedition, that the defendant began it, that he set it on foot, that he provided and prepared the means for carrying it on, are all charged in the indictment, and consequently these charges may be all supported by any legal testimony. But that a military expedition was begun or set on foot by others, or that the means were prepared or provided by others, is not charged in this indictment, is not a crime which is or can be alledged against the defendant, and testimony to that effect is therefore not relevant.

All testimony which serves to show the expedition to have been military in its character, as far for instance testimony respecting their arms and provisions, no matter by whom purchased, their conduct, no matter by whom directed or who was present, all legal testimony which serves to show the object of the expedition, as would be their actually marching against Mexico, public declarations made among themselves, stating Mexico as their object, any manifesto to this effect, any agreement entered into by them for such an expedition, these or similar acts would be received to show the object of the expedition.

In the trials of Smith and Ogden they were received. Whether the particular acts of the accused on which his guilt or innocence depends must precede this species of testimony or may be preceded by it, is a question which merely respects the order of evidence. There can be no doubt but that at some stage of the prosecution either before or after the particular part performed by the accused has been shown, the character and object of the expedition may be shown, and that by any legal testimony calculated to develope that character and object. Whether this testimony is admissible before the proof which particularly applies to the part performed by the accused, or ought to be introduced by first proving that part, is a question which is not made in this case and which was not made in the case of Smith and Ogden. In that case it was certainly entirely unimportant, and it is probably not less so in this.

It has been also contended that the acts no more than the declarations of third persons can be given in evidence on this indictment.

It has been already said that those acts of equipment which go to show the character of the expedition may be given in evidence. If for example Blannerhasset, Tyler, Smith or any other persons provided arms, ammunition or provisions which were applied to the armament, this would be evidence because it would show the character of the expedition. This was done in the case of Smith and Ogden without enquiring who provided the arms, for they belonged to the expedition. Captain Lewis for instance purchased several military equipments. It was not deemed necessary to show that Smith was connected with Lewis, for these purchases for the expedition, and Smith was not charged with providing them. He was charged with providing other means; and the means provided by Lewis served to show the character of the expedition.

But although the acts of all persons providing means applied to the expedition may be given in evidence upon the same principle that the state of the expedition may be shown, it does not follow that other acts of third persons may be given in evidence.

It has also been contended that no transactions out of the district are testimony.

This position is correct to a considerable extent, but not to the extent in which it is laid down. A declaration of Mr. Burr for example made in Kentucky or else where, that he did set on foot a military expedition on Blannerhasset's island to be carried on against the dominions of the King of Spain while the United States were at peace with that power, would I think be evidence, so would the actual marching of the troops proved to be raised by him against the province of Mexico. Testimony wich goes directly to prove the indictment, may I think be drawn from any place.

But I do not understand this to be the point really in contest. I understand the counsel of the United States to insist that

providing means in Kentucky, that enlisting men in Kentucky, that joining the expedition in Kentucky may be given in evidence to show that the accused did begin and set on foot the expedition on Blannerhasset's Island, or did provide the means at that place as charged in the indictment. This I understand to be the great question which divides the prosecution and defence.

It is I believe a general rule that in criminal prosecutions a distinct crime for which a prosecution may be instituted cannot be given in evidence in order to render it more probable that the particular crime charged in the indictment was committed—If gentleman think me wrong in this I will certainly hear them upon the point, but I believe the position to be correct. Now providing the means for a military expedition in Kentucky to be carried on against the dominion of a prince with whom the United States are at peace, is certainly in itself a distinct offence upon which an indictment may be as well supported as it can be for providing means for the same or a similar expedition in Virginia.—According to the rule laid down then, this testimony cannot be received unless it goes to prove directly the charges contained in the indictment.—But how can it go directly to prove those charges? Does it follow that the man who has provided the means in Kentucy has also provided the means in Virginia? Certainly it does not follow; and consequently the acts alledged in Kentucky do not prove the charges contained in the indictment. They would prove the defendant to have been connected in the enterprize, and gentlemen argue as if they thought this sufficient for their purpose. I shall be excused if I employ a few moments in stating my reasons for thinking it not sufficient.

I have already said, and surely no man will deny, that two distinct persons may at different places furnish different means for the same enterprize. It will I presume not be contended that one of them may be indicted for the means provided by the other. So too, if the same man shall provide means for the same enterprize at different places, as in Virginia and Kentucky, I do not imagine that an indictment for providing arms in Virginia, could be supported by proving that he provided ammunition in Kentucky. They are distinct offences for either of which he may be punished, and the commission of the one may render more probable, but does not prove the commission of the other.

How then do gentlemen mean to make this testimony relevant? It is by making the acts of Blannerhasset, Tyler and Smith the acts of Burr, by insisting that their acts show an unlawful expedition to have been begun by him in Virginia, or that the means for that expedition were provided by him in Virginia. This being accomplished, his acts in Kentucky may be adduced to corroborate or confirm the testimony which discloses his conduct in Virginia.

As preliminary then to this testimony such proof of the specific charges contained in the indictment must be given, as may be left to the consideration of the jury.

This proof relates to place as well as to fact.—"Of whatsoever nature an offence indicted may be," says Hawkins B. 2, Ch. 25. Sec. 35, "whether local or transitory, as seditious words or battery &c. it seems to be agreed that if upon not guilty pleaded it shall appear that it was committed in a country different from that in which the indictment was found, the defendant shall be acquitted."

This rule is the stronger in the United States where it is affirmed by the constitution itself, and where the jurisdiction of the court is limited to offences within the district. Its obligation therefore is complete.

If there be any direct testimony that an expedition was begun, or set on foot, or that the means were provided and prepared in Virginia, that testimony has not yet been heard so far as I recollect. If there be such testimony, it must also be shown that the expedition was begun or that the means were prepared by the accused. No single act of his in Virginia has been offered in evidence. He made a contract in the state of Ohio for boats and provisions which may have been intended as a part of the expedition, but no contract appears to have been made in Virginia, nor were the boats constructed or provisions procured in Virginia. How then is it to appear that he begun or set on foot a military expedition in Virginia, or that he provided or prepared the means for such an expedition?

It is said that if he gave orders from Kentucky or elsewhere, and in consequence of those orders the means were provided in Virginia, the accused is within the letter of the act as well its spirit, and has himself provided the means in Virginia.

If these orders were in proof, the court as well as the counsel would be enabled to view the subject with more accuracy and to treat it with more precision. Since those orders are not adduced, nor accurately stated, and the question has been argued without them, the court must decline giving any opinion, or consider the orders as offered, and say what orders would be admissible and what inadmissible. The latter course may save the bar the trouble of another argument.

To whom are orders supposed to have been given, and who are supposed to have executed them?

They must have been given to accomplices or to those who had no share in the expedition.

If accomplices under the direction of colonel Burr, have provided the means, can their liability to the penalties of the law be doubted? I presume not. If persons engaged in the expedition have provided the means for carrying it on, it will I presume be admitted that they are within the letter and the spirit of the act. Each man has himself provided and prepared those particular means which he has furnished. If col. Burr, as was the case with col. Smith, has supplied money for the expedition, then money may be charged as the means provided by him; but if that money was advanced to an accomplice its investment in means for the expedition is the act of the accomplice, for which being a free agent, he is himself responsible. The accomplice has committed the very act which the law furnishes. Has the accused by suggesting or procuring that act, also committed it?

I will not say how far the rule that penal laws must be construed strictly may be carried without incurring the censure of disregarding the sense of the legislature. It may however be safely affirmed that the offence must come clearly within the description of the law according to the common understanding of the terms employed, or it is not punishable under the law. Now to do an act, and to advise or procure an act, or to be connected or leagued with one who does that act, are not the same in either law language or in common parlance; and if they are not the same, a penalty affixed to the one is not necessarily affixed to the other. The penalty affixed to the act of providing the means for a military expedition is not affixed to the act of advising or procuring those means to be provided, or of being associated with the man who has provided them. The distinction made by the law between those persons is well settled and has been too frequently urged to require further explanation. The one is a principal the other an accessary. In all misdemeanors punishable only by a statute which describes as the sole offender the person who commits the prohibited act, the one is within and the other not within the statute. In passing the act under consideration, congress obviously contemplated this distinction. I presume that in a prosecution under the 3d section for fitting out a privateer it would not be alledged that a person who was concerned with the men who actually fitted out the privateer, but who performed no act himself, could be convicted on an indictment not for being concerned in fitting out the privateer, but for actually fitting her out. These are stated in that section as separate offences.

This distinction taken in the law, is well understood and cannot be considered as overlooked by those who frame penal acts. They cannot be considered as intending to describe one offender when they describe another, and if experience suggests defects in the penal code, the legislature exclusively judges how far those defects are to be remedied.

While expounding the terms of the act it may not be improper to notice an argument advanced by the attorney for the United States which was stopped by my observing that he had not correctly understood the opinion delivered in the case of treason. He understood that opinion as approving the doctrine laid down by Keeling and Hale that an accessary before the fact might plead in bar of an indictment as accessary that he had been acquitted as principal, whence it was inferred that on an indictment for doing an act, evidence of advising or producing that act might be received. I was certainly very far from approving this doctrine. On the contrary I declared it to contradict every idea I had ever formed on the subject. But if it were correct I endeavored to show that it could not affect that case. My disapprobation of the doctrine induced me to look further into it, and my persuasion that it is not law is confirmed. Hale vol. 2, p. 292 says "if A and B be indicted of the murder of C, upon their evidence it appears that A committed the fact and B was not present

but was accessary before the fact by commanding it, B shall be discharged."

In H. 2. ch. 85, sec. 11. Hawkins discusses this subject, shows in a note the contradiction in those authorities which maintain the doctrine, cites the opposing authorities, and obviously approves the opinion which is here given. It is apparent then, that the law never considers the commission and the procurement of an act, even where both are criminal, as the same act.

I cannot therefore consider means provided by those who are his accomplices in the expedition as means provided by col. Burr.

If the means were provided by order of the accused, by persons not accomplices and not guilty under the act, the law may be otherwise. I shall not exclude such testimony. There is however some doubt whether the place of trial should be where the orders were given or where they were executed.

At common law, if an act was procured or advised at one place and executed at another, it was doubted whether the procurer could be tried at either place because the offence was not complete at either. This difficulty was removed by a statute made in the reign of Edward 6th. If there be testimony showing by orders from the accused, means were provided in Virginia by a person not an accomplice, it may be received, and the question respecting the scene of trial put in a way for final decision.

The question whether all the means must be provided before the offence described in the statute has been committed relates to the effect rather than to the exclusion of the testimony. I shall certainly not reject any evidence which shews that any means *were provided by the accused in the place charged in the indictment.*

Upon the subject of beginning and setting on foot a military expedition or enterprize it would be unnecessary at this time to say any thing were it not on account of the question respecting the introduction of testimony out of the district.

What is an expedition? What is an enterprize?

An expedition, if we consult Johnson, is "a march or voyage with martial intentions." In this sense it does not mean the body which marches but the march itself. The term is however sometimes employed to designate the armament itself, as well as the movements of that armament.

An enterprize is "an undertaking of hazard, an arduous attempt." The proper meaning then of this word also describes the general undertaking and not the armament with which that undertaking is to be accomplished.

The first count in the indictment charges that Burr began the expedition in Blannerhasset's island. The 2d and 3d that he set on foot the enterprize in Blannerhasset's island.

If the term expedition is to be taken in its common and direct sense, that is to mean a march or voyage with martial intentions, it began where that march or voyage begun; and it must have been begun by the accused to bring him within the act.

If the term be taken in its figurative sense to designate the armament itself instead of the movement of that armament, then I cannot readily conceive an act which begins an expedition, unless the same act may also be said to provide the means of an expedition. The formation of the plan in the mind is not the commencement of the expedition within the act. Our laws punish no mental crimes not brought into open deed. The disclosure of that plan does not begin it. If it did the first disclosure would be the beginning. I find a difficulty in conceiving any act which amounts to beginning an expedition which does not also amount to providing the means for an expedition. However if there can be such an act, and if it has been committed in Virginia, it may certainly be given in evidence.

The same observations apply to setting on foot an enterprize.

These remarks are made to shew what it will be necessary to prove in order to let in corroborative proof.

It is then the opinion of the court that the declarations of third persons not forming a part of the transaction and not made in the presence of the accused cannot be received in evidence in this case.

That the acts of accomplices except so far as they prove the character or object of the expedition, cannot be given in evidence.

That the acts of the accused in a different district which constitute in themselves substantive causes for a prosecution, cannot be given in evidence unless they go directly to prove the charges laid in the indictment.

That any legal testimony which shows the expedition to be military or to have been designed against the dominions of Spain may be received.

That any testimony shewing that the accused performed within the district any one of the acts charged in the indictment may be received.

Gentlemen will know how to apply these principles. Should any difficulty occur in applying them, the particular case will be brought before the court and decided.

After the opinion was delivered several questions were addressed to the chief justice by the counsel for the United States, as to the effect of that opinion, upon particular points. At length it was deemed the most eligible course to adjourn the court 'till to-morrow, in order that the counsel on both sides might be furnished with copies of the opinion, and be enabled to judge of its application to the evidence which might be offered to prove any particular fact.

Foreign.

LONDON, Aug. 25.

With respect to the great object of national expectation---dispatches from admiral Gambier, and the proceedings of the British Fleet before Copenhagen, no fresh intelligence had been received at a late hour last night.

A letter from Yarmouth had reached this city by express which mentioned that a merchantman had put into that port, bringing intelligence of her having been actually present at the commencement of the bombardment of Copenhagen on the 12th. If it were resolved to attack the city the operations should certainly have been begun before this. Our fleet commands the whole island; its state of defence is very imperfect. Where the minds of our Governors therefore are made upon the point, and they are resolved to stand all risks, they should certainly not permit their Admiral to turn negociator, or institute a marine cabinet on the quarter deck. To act is here to do every thing; all discussion is so much delay, and advantage to the enemy. Admiral Duckworth found it so before Constantinople; let Admiral Gambier improve upon the precedent.

An expedition more formidable for mischief of any kind was never fitted out by this kingdom. The Danes have manned all their batteries, and are prepared to resist; unless we anticipate them here, we might as well have staid at home. Whatever you do, strike the blow! You have gone too far for negotiation to do you any good.

The foreign news of the week is not of much interest. The king of Sweden still keeps up a fruitless war in Pomerania, and Stralsund still resists. It is a matter of regret that so much courage and military skill as the Swedish troops possess, should be suffered to evaporate in an enterprize which neither conduct nor courage can lead to any advantageous result. Brick and mortar have only a certain power of resistance; when that power is abated or overcome, the Swedish troops must bolt from their ruins, and leave them to their enemies.

The French papers contain little news worthy of comment. All the French marshals are to be created dukes, and provided for in Germany and Poland. Talleyrand resigns the office of Secretary of State, and becomes the second man in the empire. The peace of Tilsit is likely to give both himself and his master the otium cum dignitate.

Copenhagen, August 11.

Last night we received an estasette from Kiel; immediately after all the generals and Admirals assembled, and early in the morning orders were given to mount and man the batteries of our port. The workmen were ordered to assemble at the Holm and this moment our floating batteries, flat-bottomed boats, and vessels of defence, are all either already lying out in the road, or on the point of proceeding thither.

The coast stretching to Elsineur is occupied by cavalry, and the garrison of Cronenberg has been reinforced; in short, all necessary preparations are made to repel a hostile attack. Whether such an attack will be made, and whether the English have really the intention to commit hostilities against this country, remains yet uncertain.

In the mean time the prince Royal unexpectedly arrived here this day at noon to the great joy of the inhabitants, and immediately hastened to the Holm.

The English fleet is still lying at anchor about three or four miles from this place, without having undertaken any thing. It is very strong. A chain of frigates and cutters stretches from the fleet past this city through the great Belt into the Baltic. Mr. Taylor is said to have set out for Kiel.

Holstein, August 10.

It is said that the English have demanded to be put in possession of the fortress of Cronenberg, which, however, has absolutely been refused.

Altona, August 14.

Letters from Copenhagen of the 9th. inst. state that the crown prince was hourly expected their from Kiel; at the latter place Mr. Jackson had an audience of his royal highness, to demand "whether Denmark intended to declare for or against England, as its neutrality, owing to the violent measures adopted by France, could no longer be acknowledged." The prince is said to have declared that he would consider every power as his enemy that should attempt to violate his neutrality. In the evening of the same day (the 8th) he set out for Copenhagen.

The British men of war, with the troop ships, form a complete line of circumvallation round the island of Zealand. Some divisions have also entered the great and little Belts. Between Copenhagen and Elsineur there were on the 8th eighteen sail of the line, besides frigates; in fact, the English fleet forms a telegraphic line from Copenhagen to Kiel.

This afternoon an old established commercial house here received advice by an estafette from Stralsund, (via Rostock) that the French had been repulsed, with great loss, in two attempts to take that place by assault the beginning of this week.

There is great reason to apprehend that the emperor Alexander has been induced by the intrigues and artifices of Bonaparte and Talleyrand to break off his connexion with this country. One of the secret articles in the treaty between France and Russia is said to stipulate, that unless Great Britain accept the proffered meditation within the time specified, Russia will not only shut her ports against us, and prohibit all commercial intercourse, but will form a triple alliance, offensive and defensive and with France and Prussia. There is reason to think that the mission of Sir J. Sharpe to Petersburgh, is in consequence of the information which our government has received on the points to which we have alluded.

From the Boston Gazette, September 28.

Latest from Elsinore.—Capt. Prince has arrived at Salem, from Elsineur, which he left August 12, 1807. He confirms the former account of the situation and strength of the British grand expedition off Elsinore; and adds, that messages had passed between admiral Gambier and the crown prince of Denmark, in which the British admiral demanded the delivery of the fortress of Elsineur, and the whole island of Zealand into the possession of his forces; and that the prince Regent had replied, that he should not give up the island, while a man was left living to defend it.—An attack on Elsineur was expected to be the consequence, and capt. P. states, that on the day after he sailed he heard a heavy cannonading, from which he supposed the English had begun the attack.

Latest from Europe.—Capt Fellows, in the Cumberland, arrived here, on Saturday, in 32 days from Liverpool. He brings London papers to Aug. 21, a few days later than our former dates.

The most important articles, furnished by this arrival, relate to the British expedition in the Baltic, and place the account, received at Salem, direct from Elsineur, on the most credible grounds. The following summary and remarks from the London Traveller of August 21, (latest date) are highly interesting.

"The object of our expedition to the Baltic is not likely to be amicably effected. The Danes are determined to resist. The prince Royal, who left Kiel on the 8th, reached Copenhagen at noon on the 11th, and immediately repaired to the Holm, an island in front of that city, and upon which the chief works for its protection are erected. Orders had been received the evening before to man the batteries, and to draw out from the naval arsenal every vessel capable of contributing to the defence of the place. The fleet under admiral Gambier was drawn up in order of battle, within three or four miles of Copenhagen, and some light vessels, had approached nearer to the town.

"This was the awful state of affairs on the evening of the 11th. It is clear from these preparations as well as the sudden appearance of the prince regent at Copenhagen, that the propositions made by Mr. Jackson have been rejected, and that hostilities are unavoidable. His royal highness it should seem, did not require much time to make up his mind. The interview between him and the British minister did not take place until the afternoon of the 8th, and in the course of that evening the prince left Kiel for Copenhagen. There is little doubt that he went to the capital to fight and not to negotiate.—If the lattor were the objects of his journey, he would have been accompanied by count Bernstorff, whom he left at Keil. That the negociation was terminated between the prince regent and Mr. Jackson, may be inferred from the return of the latter to Husum, and the departure of Mr. Thornton and the British consul from the Danish territories.

It is not improbable that an attack would be made upon Copenhagen previous to the day appointed for receiving the determination of that court. It is evident from the conduct of the prince regent, that no compromise was to be expected. The act of manning the batteries, and ordering the navy to be called out, could only be considered as a positive indication of resistance, and was to be met accordingly. A prompt decision of this kind on the part of our commander in the Baltic would save a world of trouble, and much of that valuable blood which we fear would otherwise be shed. If the Danes were allowed three days to encrease and improve their means of defence, there is no saying to what resistance their characteristic bravery, and the presence and example of the prince regent, may not lead them. We have already a fatal instance of the bad effects of procrastination in what occurred before Constantinople.

"The following extract of a letter received by the mail shews that little hopes of any amicable arrangements were entertained:—

Elsineur, August 11.

"Some of the merchantmen bound to Copenhagen and the Baltic, have been ordered by the commander in chief of the British fleet to remain here, until further orders."

The British fleet in the Baltic, appear to have made every disposition for a successful tack on Copenhagen, and in fact for completely surrounding the whole island. Between Holstein and the opposite shore in Zealand, to prevent the French troops from coming over, are four ships of the line, four frigates, and a number of gun-boats and transports.

The grand army of Denmark, being at Holstein, there were supposed to be not more than from 12 to 16,000 troops on the island of Zealand.

Stralsund.

Our latest accounts from Stralsund, are to the 2d August, at which time the siege had not been formally commenced, altho' several smart engagements had taken place between the outposts of the garrison and the besieging army. The inhabitants had petitioned the king, to restore to them the blessings of peace; but his answer was, that *he would rather perish in its ruins*, than submit to ignoble terms. The siege is likely to be a work of time.

Dispatches had been received from Gen. Frazier, at Alexandria, dated May 30. They state, that a reinforcement of two regiments had been received;—that they were plentifully supplied with provisions; that the place had been considerably strengthened by fortifications; and that no fears were entertained of an attack, altho' the enemy had collected from 7 to 8000 men near Rosetta.

Marshal Berthier, and M. Talleyrand, have been released from the laborious duties of their late offices. The former is appointed vice constable of France, and the latter vice grand elector. Gen. Clarke, succeeds to the office of minister at war, and M. Champony to that of foreign affairs.

Bonaparte, it seems, is at last to be *canonized*. A monument is erecting for him at Paris, 150 feet high. One hundred feet of this elevation is already completed, and the other fifty is to be built of the cannon taken in the late campaigns against Austria, Prussia and Russia, and will be the most surprising and magnificent building of the sort in the world. The whole, it is said, is to be surmounted with a colossial figure of the tyrant himself.

Hudson, *October* 6.

Col. Burr.—By the last accounts from Richmond it appears, that Burr had declared to the court "that from two letters he had just received, intimating that evidence was coming on to prove that the public and himself had been sacrificed and sold, he wished for delay."

The Knell.

DIED,

In this city, on Saturday last, Mr. DANIEL BINGHAM, jun. in the 17th year of his age.

Wreath.

EXTRACT.

From the Barber's Shop.

On reading in the Essex Register, of August 20th, "Common Sense" on the comparative powers and expense of ships of war, gun-boats, and fortifications.

Tom Paine has exploded the old-fashion'd notion,
That ships of the line are the lords of the ocean;
And shewn how a *gun-boat*, with only one gun,
In a calm can occasion a *first-rate to run*:
Nay more, he has prov'd (to cut the thing shorter)
The gun-boat can blow the first-rate out of water!
Then let nations be told, who *great navies* have arm'd,
The Sovereign of Ships is a—*gun-boat becalm'd!* *

WHIG.

Salem, August 20, 1807.

* "Gun-boats, being moved by oars, cannot be deprived of motion by calms, for the calmer the weather, the better for the boats. But a hostile ship becalmed in any of our waters, can be taken by gun-boats, moved by oars—and besides this, gun-boats in calms are the sovereign of ships."

"Common Sense."

From the Tickler,

a little paper, recently set up at Philadelphia.

Incantation for gaining an Election.

In imitation of Macbeth.

THE POLITICAL CAULDRON BURNING.

First Witch.

Thrice have the delegates been heard,

Second Witch.

Thrice the conferees confer'd,

Third Witch.

Thrice Duane hath wagg'd his chin
And bawl'd aloud—begin, begin.

First Witch.

Round about the cauldron go,
In the foul ingredients throw.
Hell-born *Hatred*, born and bred,
In a *printer's* restless head,
Hatch'd by th' metaphysic *sot*,
Boil thou in the cursed pot,

All.

Double, double, toil and trouble;
Fire burn, and cauldron bubble.

Second Witch.

Scull that holds the small remains
Of *Ferguson's* old, addle brains;
Liver of the lily's hue,
Which in *Mitchell's* carcase grew;
Sober tears, which down the cheek
Of the wise *George Bartram* sneak;
All the grief that *Philip* feels
For fine fat tripes and fresh cow-heels;
For a charm of pow'rful trouble,
Like a hell broth boil and bubble,

All.

Double, double, toil and trouble;
Fire burn, and cauldron bubble.

Third Witch.

Clippings of Corinthian brass,
Ta'en from *modest Billy's* face;
Half of *Jemmy Sharswood's* nose,
And *Miller*, modest as the rose;
Duane's address of warmest thanks,
Presented on James' river banks;
And add a grain of *Michael's* courage,
To inflame the hellish porridge.

First Witch.

Cool it with an *Orphan's* blood.
Now the charm is firm and good.

All.

Double, double, toil and trouble,
Fire burn and cauldron bubble.

Enter Old Nick, master of ceremonies.

Old Nick.

Oh! well done! I commend your pains,
And ev'ry one shall share i'th' gains.

Miscellany.

From the Crisis.

Mr. Mitchell,

IT having been suggested that the corporations of the several cities, or that the legislature at their next session, might enact some law prohibiting the present light dress of our females, and prescribing one more decent and preservative of their health, I send you my reasons against the propriety and utility of such a procedure.

I readily admit that it is a business requiring the attention of all who study the welfare of society; but cannot believe that legislative interference would be proper, or that it would be effectual.

1. This is a land of liberty. To restrain the "free-born members" of any citizen, would be an infringement of their rights, secured to them by the constitution of government. Any act, therefore, of the sort mentioned, would not be binding, but would be a mere nullity. The natural constitution of the body would powerfully remonstrate against a breach of the civil constitution, and necessarily obtain a redress of the grievance.

2. In case the legislature were to take up the matter, they never could agree as to the mode of dress to be prescribed to the ladies. Though it must be confessed that our legislature is composed of men of the first talents and experience, forming the united wisdom of the state, carefully selected, yet they would find themselves more at a loss on this subject than on turn-pikes, bridges, lotteries, and the division of counties. The country members might insist on petticoats of *linsey-woolsey*, the city members, on those of *dimity*; the elderly members might cry out for strong barricadoes, the younger ones, for something still more gauzy and which will rather assist than obstruct the vision; besides the number of strange speeches, derogating from the female form, which might be made on the occasion. All would end in talk, without coming to any determination. Much as the wisdom of the next legislature is to be admired, containing the sages from the city of New-York, it is better to leave a decision on this point to our females themselves; or to a representation chosen from among the discreet and respectable matrons. No disrespect is expressed to our honorable legislature; nor is it said that a number of old women would manage the affairs of state as well as they; but that in this single thing of dress, the ladies themselves are the best judges.

3. In case the legislature, or the corporation of any city should pass an act touching the premises, it would be wholly ineffectual. Did not the legislature pass an act against horse-racing? And do not the people horse race as fast as ever? Is there not a law against duelling? and do not our men of high honor and spirit shoot at one another as formerly? Where is the use of laws which are never enforced nor obeyed? Has not the corporation of the city of New-York, consisting always of what wisdom remains from the legislature, been striving for years to keep the hogs out of the streets, and found it in vain? Let no corporation then, nor the legislature meddle with this business; but let the ladies settle their own exhibitions and attractions.

A CITIZEN.

Diversity.

A wag remarks that he doubts even if Burr had been convicted by the jury whether the president would not have been to *pusillanimous* to have *ratified* the sentence by hanging the *Cataline* though he had *dog*matically pronounced his guilt.—*U. S. Gaz.*

Terms of the Balance,

FOR 1807.

To City Subscribers, Two Dollars and Fifty Cents, payable quarterly.

To those who receive them by Mail, Two Dollars, payable in Advance.

To those who take their papers at the Office, in bundles or otherwise, a deduction from the city price will be made.

A handsome Title Page and Table of Contents will accompany the last number of the Volume.

NOTE.

The first, second, third, fourth and fifth Volumes of the Balance may be had on the following terms:

First Volume...unbound..	$ 2,
Second Volume,	$ 2, 50
Third Volume,	$ 2, 50
Fourth Volume,	$ 2, 50
Fifth Volume,	$ 2, 50
The five together,	$ 10

If bound, the price of binding (either plain or elegant) will be added—An unbound Volume may be sent to any Post-Office in the State for 52 Cents postage; or to any Post-Office in the Union for 78 Cents.

PUBLISHED BY
HARRY CROSWELL,
No. 221, Warren-Street,
HUDSON.
Where printing in general is executed with elegance and accuracy.